STATE OF MICHIGAN

COURT OF APPEALS

TAWAS LAKE IMPROVEMENT ASSOCIATION,

Plaintiff-Appellee,

v

IOSCO COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellee,

and

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Intervening Defendants-Appellants.

UNPUBLISHED
June 26, 2003

No. 237007
Iosco Circuit Court
LC No. 94-009204-AW

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Intervening defendants Michigan's Attorney General and Department of Environmental Quality (DEQ) appeal by leave granted the trial court's order that Defendant Iosco County Board of Commissioners (the County) were not required to obtain a DEQ permit before constructing a dam on Tawas Lake. We reverse.

In 1959, the Iosco County Circuit Court issued a decree setting the level of Tawas Lake at 582.5 feet above sea level. 1939 PA 194, which survives today as part of the Natural Resources and Environmental Protection Act (NREPA),[1] gave the court authority to set the level of the lake.[2] The order also stated that departures from the set level were permitted if the

[1] 1994 PA 451, MCL 324.101 *et seq.*

[2] Specifically, the court's authority to set inland lakes level is currently codified as Part 307, MCL 324.30701 *et seq,* of the NREPA.

Department of Conservation deemed it necessary and if the parties petitioned the court to allow a departure. Despite the decree, no steps were taken to bring the lake to the level set by the court.

In 1994, plaintiff Tawas Lake Improvement Association petitioned the court for a writ of mandamus to order the County to take the necessary actions to establish and maintain the ordered lake level, which essentially would mean constructing a lake level control structure or dam. Plaintiff and the County then stipulated to hire an independent engineering firm to conduct a feasibility study and advise the parties whether establishing and maintaining the lake level was feasible. The parties agreed as follows:

> 11. Upon completion and submittal of the engineering study, the parties will determine if the engineering study provides a feasible means in which to establish the normal lake level as ordered by the 1959 Circuit Court for the County of Iosco.
>
> 12. If a feasible means by which to establish the lake level exists, Defendant will proceed with the necessary steps to maintain the Tawas Lake level at 582.0 feet above sea level. All necessary expense to maintain the Tawas Lake level at 582.0 feet above sea level, shall be special assessed through the Special Assessment District currently in existence. [3]

An engineering firm conducted the feasibility study and issued a report in May 1997. The firm concluded that the feasibility of establishing and maintaining the lake level at 582.5 feet above sea level was "favorable." However, the firm informed the parties that five permits were "likely to be required" before dam construction could proceed.[4]

Plaintiff then submitted a proposed consent judgment to order the County to proceed with construction of the dam. The court entered an order instructing the County to "proceed with the necessary steps to engineer, construct, and maintain [the dam] as is necessary to control the Tawas Lake level at 582.5 feet above sea level . . . ." The County then applied to the DEQ for the necessary permits pursuant to the NREPA. The DEQ refused to issue the permit, reasoning that the benefits of the proposed dam project were significantly outweighed by the adverse effects the dam would have on the floodplains, wetlands, and lake and river levels of Tawas Lake and the surrounding areas.[5]

---

[3] It is unclear as to why the parties stipulated to 582.0 feet instead of 582.5 feet, the court established lake level; though the 1959 court order did state that if a party appealed its judgment, the level could not be raised above 582.0 feet above sea level pending the appeal.

[4] The required permits were to be obtained from the DEQ, Army Corp of Engineers, and Iosco County.

[5] The County also applied to the Army Corps of Engineers for the required permit which was likewise denied.

Plaintiff filed a petition for contested case hearing with the DEQ's Office of Administrative Hearings. However, the DEQ held the internal appeal in abeyance pending the final outcome of the court case. After the permit denials, the County then moved to vacate the court's judgment on the ground that it could not continue with construction of the dam after having been denied the required permits. Plaintiff then filed a motion for an order to show cause as to why the County was not proceeding as ordered by the consent judgment. For the first time, plaintiff alleged that no permits were needed because the court had ordered the lake level. Before hearings were held, apparently as a result of plaintiff's new position, the Attorney General and the DEQ moved to intervene and was allowed to do so "for the limited purpose of briefing and arguing the issue of whether permits under the Natural Resources and Environmental Protection Act are required for the lake level project at issue." The court ordered the parties to submit briefs on this limited issue.

The court heard the matter on April 27, 2001, and decided that a DEQ permit was not required by the statute. Intervening defendants filed an appeal by right, which was rejected by this Court. This Court determined that the trial court's April 27, 2001 order was a post-judgment order, the final judgment having been entered on January 12, 1998. Thereafter, intervening defendants filed a delayed application for leave to appeal, which this Court granted. The County has adopted intervening defendants' position on appeal.

I

The main issue on appeal is whether the trial court erred in concluding that permits were not required under the NREPA for the Tawas lake level project, where decades before the court had ordered that the lake be maintained at a certain level. This Court reviews matters of statutory construction de novo. *Omelenchuk v City of Warren*, 466 Mich 524, 527; 647 NW2d 493 (2002).

This Court's primary concern in construing statutes is to give effect to the intent of the Legislature. *Id.* at 528. The first step in determining intent is to review the specific language of the statute. *Id.* Where the language of the statute is clear, judicial construction is neither necessary nor permitted. *Id.* An act must be "construe[d] as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). The construction should be reasonable and comport with the purpose of the act. *Id.* at 158. The Supreme Court has also instructed:

> "Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." [*State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell*, 374 Mich 543, 558; 132 NW2d 660 (1965) (citations omitted).]

II

The Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*, was enacted to "protect the environment and natural resources of the state . . . ." 1994 PA 451. The Act is a consolidation and recodification of the "laws relating to the environment and natural resources." *Id.* A circuit court's authority to set the level of lakes within its jurisdiction is set forth in Part 307 of the NREPA, inland lake levels, MCL 324.30701-MCL 324.30723. The specific section states:

> (1) The county board of a county in which an inland lake is located may upon the board's own motion, or shall within 45 days following receipt of a petition to the board of 2/3 of the owners of lands abutting the inland lake, initiate action to take the necessary steps to cause to be determined the normal level of the inland lake.
>
> (2) Unless required to act by resolution as provided in this part, the county board may delegate powers and duties under this part to that county's commissioner, road commission, or other delegated authority.
>
> (3) If a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level. [MCL 324.30702.]

When the trial court held that a DEQ permit was not required in this case, it only considered Part 307 of the NREPA, and reasoned that the part did not "condition the Court's authority to set and maintain lake levels upon the permission of the DEQ." The court stated that "[n]owhere within said Act is there a requirement for a permit," and that the only requirement involving the DEQ was the agency's obligation to assist with plans and specifications for the dam, characterizing the DEQ's role as one of "affirmative duty" rather than "final authority." However, the court did not address or discuss the language of MCL 324.30723, the last provision in Part 307, that provides: "This part does not abrogate the requirements of other state statutes."

We believe that the court's failure to consider MCL 324.30723 was error. This provision clearly indicates the Legislature's recognition that permits may be required under other parts of the NREPA, and, in fact, other parts of the act do require permits. In Part 301, MCL 324.30102 provides, in pertinent part, that a permit issued by the DEQ is required in order to engage in any of the following actions: (a) dredge or fill bottomland; (b) construct, enlarge, extend, remove, or place a structure on bottomland; (c) erect, maintain, or operate a marina; (d) create, enlarge, or diminish an inland lake or stream; and (e) structurally interfere with the natural flow of an inland lake or stream. Section 30104 further provides in part:

> (1) Before a project that is subject to this part [Inland Lakes and Streams] is undertaken, a person shall file an application and receive a permit from the department. The application shall be on a form prescribed by the department and shall include any information that may be required by the department. If a project includes activities at multiple locations, 1 application may be filed for the combined activities. [MCL 324.30104(1).]

In deciding whether to issue a permit, the act requires that:

> The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state. [MCL 324.30106.]

Also, MCL 324.3104, which covers water resources protection, states that the DEQ "shall have control over the alterations of natural or present watercourses of all rivers and streams," and that a person "shall submit an application for a permit to alter a floodplain." Additionally, MCL 324.30311(1), which involves wetland protection, provides: "A permit for an activity listed in section 30304[6] shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful."

Plaintiff acknowledges that ordinarily permits would be required, but argue that, in this case, the County could maintain the level without obtaining a DEQ permit. Plaintiff asserts that if the Legislature intended for a permit to be required under Part 307, where the court sets the lake level, it would have included such a provision in Part 307. However, such a conclusion would ignore one of the tenets of statutory construction. Statutes that relate to the same subject or share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Schuster, supra* at 417. The Legislature is presumed to be familiar with the rules of statutory construction. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). MCL 324.30723 specifically states that the provisions in Part 307 do not "abrogate the requirements of other state statutes." Adopting plaintiff's position would render MCL 324.30723 nugatory, a construction that we must avoid if at all possible. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999).

As noted above, many provisions in the NREPA give the DEQ authority to control changes to the state waters. Most notably, the NREPA provides that dams are under the jurisdiction of the DEQ, MCL 324.31506, and a permit is required for any new dam construction, MCL 324.31509. In fact, in Part 307, MCL 324.30722 provides for periodic inspections of dams constructed on inland lakes where a normal water level has been established, and subsection(2) confers approval of plans and specifications of a dam's repair or replacement on the DEQ. The DEQ is required to confirm any report that "discloses a need for repairs or a change in condition of the dam that relates to the dam's safety or danger to the natural resources." MCL 324.30722(2). Additionally, MCL 324.31519(2) confers on the DEQ the

[6] The activities included in this section are: depositing fill material, dredging or removing material, use or development, and draining surface water. MCL 324.30304.

authority to order the removal of a dam "[w]here significant damage to persons, property, or natural resources or the public trust in those natural resources occurs as a result of the condition or existence of a dam." Therefore, it follows that, as in this case, where the dam was never constructed, the DEQ's authority to require a permit for new dam construction is not abrogated by the court's prior lake level determination.

Furthermore, the NREPA does delineate certain instances in which a permit is not required. See, e.g., MCL 324.30103; MCL 324.30305; MCL 324.31506(3). Yet, none of the exceptions are applicable in this case. Therefore, giving effect to MCL 324.30723, we hold that the trial court erred in concluding that the County was not required to obtain permits from the DEQ before constructing the dam.[7]

Plaintiff also argues that where a court has determined a lake level and ordered its maintenance pursuant to its authority in Part 307 of the NREPA, requiring a person to obtain a permit from the DEQ violates the separation of powers doctrine. We disagree.

The separation of powers doctrine exists "to preserve the independence of the three branches of government." *Hopkins v Michigan Parole Bd*, 237 Mich App 629, 636; 604 NW2d 686 (1999). Some overlap in powers is contemplated. *Id.* Under the NREPA, the circuit courts can still determine inland lake levels, though their ultimate power to enforce their orders is curtailed by the DEQ's power to protect natural resources. However, neither branch is prohibited from exercising their authority. "If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Id.* Here, the grant of power to determine lake levels is limited and specific (the power may be exercised in concert with the DEQ's power to protect natural resources), and the grant does not encroach on or aggrandize the DEQ's power or vice versa. Therefore, we find that there is no separation of powers violation.

Reversed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

[7] We do not decide the propriety of the DEQ's refusal to issue a permit in this case, as that issue is not before us.